

**U.S. Department of Labor**

Office of Administrative Law Judges  
Seven Parkway Center - Room 290  
Pittsburgh, PA 15220

(412) 644-5754  
(412) 644-5005 (FAX)



**Issue Date: 28 February 2005**

Case No. 2004-BLA-5892

In the Matter of

THOMAS E. PIERCE,  
Claimant,

v.

CONSOLIDATION COAL CO.,  
Employer,

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.

Appearances:

Daniel Chunko, Esq.  
For the Claimant

George Stipanovich, Esq.  
For the Employer/Carrier

Before: MICHAEL P. LESNIAK  
Administrative Law Judge

**DECISION AND ORDER — DENYING BENEFITS**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* (the Act). The Act and implementing regulations, 20 C.F.R. Parts 410, 718, and 725 (Regulations), provide compensation and other benefits to coal miners who are totally disabled by pneumoconiosis and to the surviving dependents of coal miners whose death was due to pneumoconiosis.

The Act and Regulations define pneumoconiosis (commonly known as black lung disease, coal workers' pneumoconiosis or CWP) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. 20 C.F.R. § 725.101(a)(23).

## PROCEDURAL HISTORY

The Claimant, Thomas Pierce, filed this first claim for benefits with the Department of Labor (DOL) on December 6, 2002; that claim was denied on November 5, 2003, by a DOL claims examiner. DX-28.<sup>1</sup> Claimant disagreed with the determination and on November 25, 2003 requested a hearing before the Office of Administrative Law Judges (OALJ).

On December 7, 2004, I held a hearing in Pittsburgh, Pennsylvania. The Claimant and Employer/Carrier, both represented by counsel, were afforded the full opportunity to present evidence and argument. I admitted Director's exhibits 1–35 and Employer's exhibits A and B. TR 4–5. The parties stipulated to Employer's proper designation as the Responsible Operator, to twenty-four years of qualifying coal-mine employment by the Claimant, to the correct benefits application date of December 6, 2002, to Claimant's total disability from a respiratory condition within the meaning of the Act and Regulations, and to the qualification of one dependent, Claimant's wife Shirley, for purposes of augmentation of benefits. TR 6–7.

## ISSUES

- (1) Whether the miner has pneumoconiosis;
- (2) Whether the miner's pneumoconiosis arose out of his coal mine employment; and
- (3) Whether the miner's total disability is due to pneumoconiosis.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Length of Coal Mine Employment

The parties agree and I find that the evidence of record establishes that Claimant was a coal miner within the meaning of the Act and Regulations for twenty-four years. TR 6; DX-10.

### Date of Filing

Claimant filed this claim on December 6, 2002. DX-1. I find that Claimant timely filed the present claim pursuant to 20 C.F.R. § 725.309.

### Responsible Operator

The parties agree and I find that Consolidation Coal Co. is the last employer for whom the Claimant worked as a coal miner for a cumulative period of at least one year. Therefore, Employer is the properly designated responsible coal mine operator in this case.

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<sup>1</sup> I use the following abbreviations herein: DX = Director's Exhibit; EX = Employer's Exhibit; TR = Transcript of the December 7, 2004 hearing; BCR = Board-certified radiologist; B = NIOSH-certified "B" reader of x-rays.

### Dependents

I find that Claimant has one dependent for purposes of augmentation of benefits under the Act, his wife, Shirley Pierce. TR 8; DX-11.

### Background

The Claimant was born on March 28, 1949. TR 15; DX-12; DX-13. At the hearing, Claimant testified that he last worked as a coal miner on September 20, 2002, at Consolidation Coal Company's coal mine in Green County, Pennsylvania. TR 8-9. During all his years of his coal-mine employment, Claimant worked underground and was nearly always at the face. TR 9. His last job was as a shuttle car operator, which involved sitting for eight hours per day to drive the vehicle, standing for two hours per day, and two or three times per day lifting forty-pound items and carrying them forty feet. TR 9; TR 20. Claimant stopped working in 2002 because the mine shut down, but his health had deteriorated at that time to the point that he no longer felt able to work. TR 8; TR 13.

Claimant testified about his state of health. He has been in the care of a pulmonary doctor for at least two years, and has been using an oxygen tank twenty-four hours a day for the past year. TR 9-10; TR 12. He sees another doctor for sleep apnea and goes to a four-physician practice for general medical care. TR 12; TR 20. Claimant has been hospitalized twice for pneumonia in the past two years. TR 12. He currently takes medication to treat his breathing problems, high cholesterol, high blood pressure, urinary tract problems, arthritis, and gout. TR 11. Claimant reported that his current shortness of breath has been present and worsening since he worked in the mines. TR 12. He recalled having to stop to rest when working in the mine because he became breathless when walking or loading supplies. TR 13. At this point, Claimant estimated that he can only walk twenty-five feet before having to stop to rest. TR 13.

Claimant testified that he began smoking in 1962, although he had smoked occasional cigarettes since the age of six. TR 14; TR 23. He smoked at varying rates, from as little as half a pack per day to as high as two packs a day on weekends, until he quit in 2001. TR 14; TR 24. He now smokes one cigar per day but does not inhale the smoke. TR 14.

Upon questioning, Claimant clarified that he was off work for five or six years starting in 1988 due to a back injury. In addition, he was enlisted in the Marine Corps from 1966-1969, during which time he was exposed to Agent Orange.

## Medical Evidence

### Chest X-rays

<b>Exh.#</b>	<b>X-ray Date</b>	<b>Physician/Qualifications</b>	<b>Interpretation</b>
DX-20	1/23/03	Thomeier, BCR/B	No evidence of pneumoconiosis.
DX-21	1/23/03	Namani, BCR/B	Quality reading only; quality 1.
EX-A	1/23/03	Fino, B	No evidence of pneumoconiosis.
EX-A	11/24/04	Fino, B	No evidence of pneumoconiosis.

### Pulmonary Function Studies<sup>2</sup>

<b>Exh.#</b>	<b>Date</b>	<b>Age/Height</b>	<b>FEV1</b>	<b>MVV</b>	<b>FVC</b>	<b>Qualify?</b>
DX-17	2/4/03	53/64"	1.07	60	1.78	Yes
EX-A	11/24/04	55/64"	1.43 1.45*		1.97 2.03*	Yes Yes

### Arterial Blood Gas Studies

<b>Exh.#</b>	<b>Date</b>	<b>pCO2</b>	<b>pO2</b>	<b>Qualify?</b>
DX-16	1/23/03	47	64	No
EX-A	11/24/04	41	57	Yes

### Physicians' Reports

#### *Dr. Yong Dae Cho*

Dr. Cho examined the Claimant at the request of the DOL and submitted a report dated February 4, 2003. The report is in the record at DX-15. Dr. Cho recorded Claimant's coal-mine work history as spanning twenty-nine years. Claimant also reported a history of pneumonia in 2000, chronic bronchitis, arthritis of the legs and back, high blood pressure, sleep apnea, and depression. Dr. Cho noted Claimant's smoking history as spanning from 1964 to 2002 at a rate of two packs per day (approximately eighty pack years).

Upon physical examination of Claimant, Dr. Cho noted that Claimant was short of breath, had trace edema in his ankles, and had scattered rhonchi and wheezes upon auscultation of his lungs. Dr. Cho consulted a 1/23/03 x-ray that a reader had found showed no acute cardiopulmonary process. The physician also consulted the results of a pulmonary function

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<sup>2</sup> An asterisk (\*) indicates a post-bronchodilator value.

study (PFS) and arterial blood gas study (ABG). The PFS showed a severe obstructive lung defect in the FEV1 value plus a “restrictive defect that cannot be excluded by spirometry alone.” Dr. Cho wrote no evaluatory notes regarding the ABG results.

Dr. Cho diagnosed Claimant with severe COPD on the basis of PFS results and his symptoms. The etiology of the disorder is “most likely” cigarette smoking, although Dr. Cho estimated that coal-mine dust exposure caused “some” of the disorder. The physician also diagnosed hypertensive ASHD (arteriosclerotic heart disease) and sleep apnea, both of unknown etiology, and obesity. Finally, Dr. Cho concluded that Claimant is totally disabled by COPD and hypertensive ASHD.

*Dr. Joshua A. Perper*

Dr. Perper examined Claimant at the request of Employer and submitted a report dated December 1, 2004 that is in the record at EX-A. Dr. Perper is Board-certified in internal medicine and pulmonary disease and is a NIOSH-certified B reader of x-rays. EX-B. So as not to muddle the record with improper evidence, I will first discuss the contents of the report generally and rule as to the admissibility of this evidence. I will then detail the admissible elements of the report.

Dr. Perper’s report consists of (1) results of objective testing conducted as part of his examination of Claimant; (2) results of his physical examination of Claimant; (3) Claimant’s medical history, work history, smoking history, and complaints as reported to Dr. Perper; (4) a listing of other medical records from Claimant’s history that Dr. Perper consulted; (5) Dr. Perper’s interpretations of the results of the new objective testing, in light of all the Claimant’s medical records; (6) Dr. Perper’s analysis of Claimant’s condition, based on all medical evidence before him; and (7) Dr. Perper’s diagnoses and conclusions, based on all medical evidence before him.

Dr. Perper listed all the pieces of medical evidence that he examined before rendering his opinion. Among that medical evidence are the following items that are not part of the claim file:

- Claimant’s answers to Employer’s interrogatories.
- Medical records from Tri-Country Orthopaedics, dated 12/99–8/03.
- Medical records from Drs. Martin, Harris & Noftzger, dated 11/00–6/04
- PFS studies dated 12/6/00 and 4/9/02.
- Medical records from Dr. Patterson, dated 1/01–10/01.
- Chest x-rays dated 11/16/00, 12/6/00, 3/29/01, 7/24/01, 8/29/01, 3/25/02.
- Reports of chest x-rays dated 12/22/02, 1/23/03, 2/6/03, 10/5/03, 10/13/03, 10/15/03, 11/25/03, 3/4/04, and 6/5/04.
- Operative reports dated 7/27/01, 10/25/02, and 11/8/02.
- Echocardiogram reports dated 8/29/01 and 2/11/03
- Sleep study reports dated 3/5/02 and 8/14/02.
- Medical records from a pulmonary practice group, dated 3/02–5/04.
- CT scan report dated 2/11/03.
- Psychiatric office records, dated 5/03–6/04.

- Medical records from Dr. Seaman's office, dated 6/03–3/04.
- Medical records from Dr. Siegel's office, dated 6/03–9/03.
- Medical letter by Dr. Siegel dated 6/23/03.
- Pulmonary rehabilitation summary dated 10/16/03.
- Report of perfusion lung scan dated 10/16/03.

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-\_\_, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Benefits Review Board found that an ALJ properly declined to consider a report authored by Dr. Bellotte and admitted as part of Employer's affirmative case. The medical report was based, in part, on Dr. Bellotte's interpretation of a chest x-ray study that was not in evidence. Because Employer opted not to utilize Dr. Bellotte's x-ray reading as one of the two permitted in its affirmative case, the Board found that the ALJ properly did not consider Dr. Bellotte's medical opinion regarding the existence of pneumoconiosis. The ALJ found that the opinion was "inextricably tied to [Dr. Bellotte's] chest x-ray interpretation, which was previously excluded from the record." The Board concluded that any chest x-ray referenced in a medical report must be admissible. The Board further noted that "[t]he same restriction applies to a physician's testimony."

In light of the *Dempsey* decision, I have examined Dr. Perper's report to discover which, if any, of its contents is inextricably tied to Dr. Perper's evaluation of the medical evidence he examined that is not in the claim record. Of the elements of Dr. Perper's report that I described above, I find that only items (1) through (3) appear to be independent of the physician's consideration of medical evidence not in the record, to wit: the objective testing results from November, 2004; the physician's observations of Claimant's physical condition upon examination; and the physician's record of Claimant's medical history, work history, smoking history, and complaints at the November, 2004 examination. Items (5) through (7) all contain significant references to the non-admitted evidence, and I conclude that it would be improper for me to include them in my deliberations. I therefore find that only items (1) through (3) are properly in evidence in the claim file. The evidence that I consider from Dr. Perper's report follows.

Dr. Perper noted Claimant's smoking history as spanning forty-seven years, from age six until 2002, at a rate of one to two packs per day. By my calculations, this is equivalent to approximately seventy pack years. The physician noted Claimant's coal-mine work history as covering twenty-eight years ending in 2002, with all work underground and with a final job as shuttle car operator. That position included performing heavy labor.

At the examination, Claimant reported a history of frequent colds, COPD that was diagnosed in 2001, emphysema, sleep apnea, high cholesterol, pneumonia, gout, rheumatoid arthritis, depression, heart catheterization surgery in 1999, chronic bronchitis, frequent headaches, fractured ribs, and gastroesophageal reflux disease. Claimant complained of shortness of breath that had lasted for ten years and was worsening; the dyspnea interferes with daily activities and occurs when walking at his own pace at no grade, or when ascending one flight of stairs. Claimant's other complaints were chest pain, a daily cough with mucus, and wheezing. Dr. Perper conducted a physical exam of Claimant and detected diminished breath sounds with wheezes upon auscultation.

### *Deposition Testimony of Dr. Perper*

After the hearing, and with my permission, Employer submitted a transcript of the deposition testimony of Dr. Perper that was taken on December 14, 2004. I identify the exhibit as EX-C. In his testimony, Dr. Perper clearly integrated the medical evidence not of record with that obtained upon his own examination of the Claimant. Further, I am unable to extricate the parts of Dr. Perper's testimony that consider only admitted evidence. As a result, and because of my interpretation of the Regulations and the Benefits Review Board's decision in *Dempsey*, I do not admit Dr. Perper's deposition testimony into the record and I do not consider it in my deliberations.

### Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, a claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202–718.205; *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). As I noted above, the parties have stipulated to the existence of a totally disabling respiratory condition in the Claimant. TR 7.

The Claimant's last work as a coal miner was within the Commonwealth of Pennsylvania, which is located within the jurisdiction of the Third Federal Circuit. The Benefits Review Board applies the law as it is interpreted by the applicable Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

### Existence of Pneumoconiosis

The Regulations define pneumoconiosis broadly, as “a chronic disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.” 20 C.F.R. § 718.201. The Regulations' definition includes not only medical, or “clinical,” pneumoconiosis but also statutory, or “legal,” pneumoconiosis. *Id.* Clinical pneumoconiosis comprises:

Those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis, or silico-tuberculosis, arising out of coal mine employment.

*Id.* Legal pneumoconiosis, on the other hand, includes “any chronic lung disease or impairment and its sequelae” if that disease or impairment arises from coal-mine employment. *Id.* A claimant's condition “arises out of coal mine employment” if it is a “chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by,

dust exposure in coal mine employment.” *Id.* Finally, the Regulations reiterate that pneumoconiosis is “a latent and progressive disease” that might only become detectable after a miner’s exposure to coal dust ceases. *Id.*

Pneumoconiosis is a progressive and irreversible disease. *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. *See Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151–152 (1987). However, this rule is not mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319–320.

The Regulations provide four methods for finding the existence of pneumoconiosis: chest x-rays, autopsy or biopsy evidence, the presumptions in §§ 718.304, 718.305, and 718.306, and medical opinions finding that Claimant has pneumoconiosis. *See* 20 C.F.R. § 718.202(a)(1)–(4). In the face of conflicting evidence, I shall weigh all of the evidence together in finding whether the miner has established that he has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 4th Cir. 2000).

The x-ray evidence of record contains no support for a finding that Claimant has pneumoconiosis. None of the three interpretations of two x-rays concluded that Claimant has the disease. I therefore find that Claimant has not demonstrated that he has clinical pneumoconiosis under § 718.202(a)(1).

The record contains no biopsy evidence. Claimant has therefore not demonstrated that he has pneumoconiosis under § 718.202(a)(2).

Claimant is not eligible for the presumptions at § 718.304, § 718.305, or § 718.306. This is because no credible evidence exists in the record that Claimant has complicated pneumoconiosis, because he filed this claim after January 1, 1982, and because he is still living. I therefore find that Claimant has not shown that he has pneumoconiosis under § 718.202(a)(3).

Additionally, a determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, based upon certain clinical data and medical and work histories and supported by a reasoned medical opinion, finds that the miner suffers from pneumoconiosis. 20 C.F.R. § 718.202(a). Medical reports that are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations.<sup>3</sup> *Justice v. Director, OWCP*, 6 BLR 1-1127 (1984). However, where the physician’s report, although documented, fails to explain how the documentation supports its conclusions, an ALJ may find the report to be not a reasoned medical opinion. *Smith v. Eastern Associated Coal Co.*, 6 BLR 1-1130 (1984). A

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<sup>3</sup> Varying accounts of Claimant’s smoking history appear within the record. By my calculations, Claimant reported a smoking history to Dr. Cho of approximately eighty pack years. Claimant reported to Dr. Perper a smoking history of roughly seventy pack years. At his hearing, Claimant testified that his smoking history equals approximately thirty-nine pack years. Because Claimant admitted at the hearing that his memory of his smoking habit was somewhat unreliable, I accept as credible Claimant’s accounts to Dr. Cho and Dr. Perper; I conclude that Claimant’s smoking history is 70–80 pack years.

medical opinion is not sufficiently reasoned if the underlying objective medical data contradicts it. *White v. Director, OWCP*, 6 BLR 1-368 (1983).

I give little weight to the one complete medical report in evidence, that of Dr. Cho. The physician's conclusions were based on objective testing results and were therefore documented. However, Dr. Cho's brief analysis and conclusions do not affirmatively explain the etiology of Claimant's respiratory disorder, COPD. In Dr. Cho's words, the "most likely" cause of Claimant's COPD was smoking, with coal dust contributing "some" to the disorder. These statements are equivocal and are not adequate to render Dr. Cho's report well-reasoned. Therefore, although I give a small amount of weight to Dr. Cho's report, I find its conclusions unhelpful in rendering my decision.

I give no weight to the report of Dr. Fino, as I have excluded his analysis and conclusions from evidence and do not consider them.

Upon examining the medical-report evidence of record, I conclude that it does not support a finding of CWP under § 718.202(a)(4).

Weighing all the evidence together, I observe that I found inadequate evidence to show CWP in the Claimant by x-ray evidence, biopsy evidence, or medical-report evidence. I further found that Claimant was not entitled to any of the presumptions of pneumoconiosis under § 718.202(a)(2). It is Claimant's burden to show that he has CWP by a preponderance of the evidence. I must therefore conclude that Claimant has failed to demonstrate that he has legal or clinical pneumoconiosis within the meaning of the Act and Regulations.

#### Cause of Pneumoconiosis

If a miner is found to be suffering from CWP, then the ALJ must determine whether that disease was caused by his occupational exposure to coal-mine dust. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, then there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). I find that Claimant, with twenty-four years of coal mine employment, would be entitled to the rebuttable presumption at § 718.203 if he were found to have pneumoconiosis. However, because Claimant has not met his burden of showing that he has the disease, I find that this issue is moot.

#### Cause of Total Disability

To be eligible for benefits under the Act, the Claimant must show that he suffers from a total pulmonary disability caused by pneumoconiosis. 20 C.F.R. § 718.204(b). In this case, the only evidence of causation is contained within Dr. Cho's medical report at DX-15. Dr. Cho concluded that Claimant is totally disabled by COPD and hypertensive ASHD. The physician further concluded that Claimant's COPD was caused "most likely" by his cigarette smoking, with his exposure to coal dust contributing only "some" to the presence of the disease. Dr. Cho did not state whether the COPD, in itself, was a totally disabling condition, and further he did not provide adequate reasoning to explain his assignment of weight among the risk factors (smoking

and coal-dust exposure). For that reason, I find that no credible evidence exists in the record to support a finding that Claimant is totally disabled due to his coal-mine dust exposure. Claimant has not met his burden of showing, by a preponderance of the evidence, that the etiology of his disabling respiratory condition is occupational under § 718.204(b).

### Conclusion

As Claimant has not established all elements of entitlement, I conclude that he is not entitled to benefits under the Act.

### Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

### ORDER

The application of Thomas E. Pierce for benefits under the Act is hereby DENIED.

**A**

MICHAEL P. LESNIAK  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days of the date this Decision and Order was filed in the office of the District Director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.